Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1185

MEMORIAL CONSULTANTS, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. GEORGE W. LINDBERG, COMPTROLLER OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

JURISDICTIONAL STATEMENT.

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ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

JURISDICTIONAL STATEMENT.

Appellant appeals from the opinion and judgment of the Appellate Court of Illinois, Third District, reversing the judgment of the Circuit Court of Peoria County and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion below is reported as *People ex rel. Lindberg* v. *Memorial Consultants, Inc.*, 50 Ill. App. 3d 1005, 366 N. E. 2d 127 and it is attached hereto as Appendix A. The trial court filed no opinion and made no findings.

JURISDICTION.

This action was brought on behalf of the People of the State of Illinois and claimed that appellant is engaged in the business of selling burial vaults in advance of need in violation of the Illinois Funeral or Burial Trust Fund Act [App. C]. Appellant denied it was subject to the Act and affirmatively asserted that if applied to its business the statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The trial court held in favor of appellant but on appeal the court below reversed and explicitly rejected the federal constitutional challenge.

A timely filed petition for rehearing [Ill. Rev. Stat., Chap. 110A § 367] was denied on August 30, 1977 and appellant petitioned for leave to appeal to the Illinois Supreme Court under the Ill. Rev. Stat., Chap. 110A § 315. That court summarily denied the appeal petition on November 23, 1977. Notice of Appeal to the Supreme Court of the United States [App. B] was filed in the Third District Appellate Court of Illinois on February 15, 1978 and the case is docketed in this Court on or before February 23, 1978.

Jurisdiction of the Supreme Court to review the attached decision [App. A] by direct appeal is vested by 28 U. S. C. §§ 1257(2) and 2101(c). [*Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 61 n. 3].

QUESTION PRESENTED.

Where the Illinois Funeral or Burial Trust Fund Act prohibits appellant's otherwise lawful business and creates a monopoly in favor of funeral directors selling similar products at the time of need (death) and where it bears no rational *nexus* to the public interest sought to be protected, does the statute violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States?

STATUTES INVOLVED.

The pertinent provisions of the Illinois Funeral or Burial Trust Fund Act [Ill. Rev. Stat. 1969, Chap. 111½ §§ 73.101, 73.102, 73.103 and 73.104] are set forth in Appendix C, hereto.

STATEMENT.

Appellant, Memorial Consultants, Inc., is an Illinois corporation engaged in the business of selling burial vaults prior to need (death). Appellee, as duly elected Comptroller of the State of Illinois, is the official charged with the administration and enforcement of "an Act concerning agreements for furnishing or delivery of personal property merchandise or services in connection with the final disposition of dead human bodies and regulating use or disposition of dead human bodies and regulating use or disposition of funds paid on said agreements and providing penalties for violation thereof." [Ill. Rev. Stat. 1969, Chap. 111½ §§ 73.101 *et seq* (App. C)] (called Funeral or Burial Trust Fund Act).

This suit was instituted on June 2, 1971, claiming that appellant was in the business of selling burial vaults in advance of need, that this conduct subjects it to the regulatory provisions of the Funeral or Burial Trust Fund Act and that it has failed to comply with the Act. The complaint requests an injunction to prevent violaions of the Act and an accounting of funds collected in violation of the Act. Appellant's answer and affirmative defense denies that it is subject to the Act and asserts that the Act, if applied to its burial vault business, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

In summary, the Funeral or Burial Trust Fund Act requires that the entire amount of appellant's gross receipts without any allowance for costs of goods sold nor operating expenses be entrusted when received and that "the amount or amounts so

deposited, with interest thereon . . . shall not be withdrawn until the death of the person or persons for whose funeral or burial such funds were paid" [Ill. Rev. Stat. 1969, Chap. 111½ §§ 73.102 and 73.104 (App. C)]. It is against this statutory background that the following facts stand stipulated to or admitted by the pleadings:

1. That appellant's cost of vaults sold is less than 35% of gross vault receipts and together with other operating expenses produces an average net profit margin of 5% [R. C164].

2. That appellant's sales contract provides that if the purchaser does not request delivery within 60 days following payment in full it will hold the present-day cost of the merchandise in the purchaser's name, that if the cost of the merchandise has increased by the date of delivery the purchaser will pay the additional cost and that if the cost has declined the purchaser will receive a rebate [App. A].

3. That the average life expectancy of appellant's vault purchasers is 20 years, or more, from the time the purchase agreement is made [R. C164].

4. That during the years 1972, 1973 and 1974, appellant entered into some 9000 sales agreements and that during the same period of time a substantial number of prior contracts were performed and that appellant has never acted fraudulently nor has it ever been financially insolvent [R. C208 & C209].

5. That appellant, and those similarly situated, provide the only horizontal competition to funeral directors whose sales are principally made to a decedent's next-of-kin between the time of death and time of burial and that said sales by funeral directors are much more costly to the consumer (50% to 75% higher) than are comparable sales when made by appellant [R. C162 & C199].

Based on the foregoing, the trial court, without opinion nor findings, entered judgment for appellant "in bar of plaintiff's

cause of action" and appeal was taken to the Third District Appellate Court of Illinois.

Couched in terms of appellant's brief in the Illinois Appellate Court the issues in the state court appeal were as follows:

I.

The Burial Trust Fund Act Cannot Be Reasonably Construed So as to Apply to Defendant's Burial Vault Business and to the Sales Agreement Used in Connection Therewith.

II.

If the Burial Trust Fund Act Applies to Defendant's Burial Vault Business, Then the Statute as So Construed and Applied Is Arbitrary, Confiscatory and Unreasonable in Violation of the Due Process and Equal Protection Clauses of the Federal . . . Constitution.

The Illinois Appellate Court reversed the trial court and after holding that the Funeral or Burial Trust Fund Act does indeed apply to appellant it went on to, in essence, hold that even though the statute as here applied is prohibitary as a matter of fact it is nevertheless constitutional because it merely regulates as a matter of law.

THE QUESTIONS ARE SUBSTANTIAL.

I.

That the questions are far more substantial than this particular case is evident from Federal Trade Commission proceedings concerning proposed trade regulation rules for the funeral industry [See: 40 F. R. 39901 (8/29/75) and 41 F. R. 7787 (2/20/76)]. Appendix D hereto contains excerpts from "Report by The Presiding Officer on Proposed Trade Regulation Rule Concerning Funeral Industry Practice [16 C. F. R. Part 453,

Public Record 215-46 (July, 1977)]." *Inter alia* the "Report" finds:

> Among devices used by the funeral industry to restrict pre-need sales are state laws and regulations that require a 100% burial trust fund deposit of pre-need funds. * * * If a seller must deposit 100% of the sales price of a pre-need contract he will have no funds to pay overhead, particularly salaries and commissions until a distant future date * * *. Without funds to pay overhead, prospective sellers of pre-need funerals will not enter this market. * * * * As a consequence, if a seller will not sell, the consumer is deprived of the opportunity to choose freely among alternatives which should be available to him.
>
> If a 100% requirement is excessive, what then is the appropriate actuarially based requirement? An official of the Comptroller of the State of Illinois made a study of the burial trust law of Illinois. * * * * The study indicates that the deposit of the current cost (not the sales price) of merchandise or services * * * would provide adequate funds to deliver such goods and services at any given time in the future. Results will vary as assumptions vary. The study, however, substantiates the position that a 100% deposit is not necessary as a requirement to guarantee delivery of promised funeral goods and services at a later date. [App. D, A20-A21.]

SUMMARY.

The funeral consumer can avoid problems associated with at-need sales by making funeral arrangements in advance of need. His opportunity to do so is presently restricted by the 100% trust fund laws * * *. These restrictive laws have been sponsored by traditional (at-need) funeral industry members [App. A22].

II.

The basic proposition is conceded by everyone involved, including the court below. "That appellant's business is a property right (*Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443,

465; *Traux* v. *Corrigan*, 257 U. S. 312, 327) and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear. That a corporation is a person within meaning of the due process and equal protection clauses of the Fourteenth Amendment . . . is equally well settled (Citations omitted). And, unless justified as a valid exercise of the police power, the Act assailed must be declared unconstitutional because the enforcement thereof will deprive appellant of its property without due process of law. The Act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public (welfare) and the determination we are called upon to make is whether the Act has a real substantial relation to that end or is a clear and arbitrary invasion of appellant's property rights guaranteed by the Constitution (*Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111].

Furthermore, "while this Court has not attempted to define with exactness the liberty thus guaranteed (by the Fourteenth Amendment), the term has received much consideration, and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life . . . and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men (Citations omitted). The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts (Citations omitted)." [*Meyer* v. *Nebraska*, 262 U. S. 390, 399-400].

Whether tested by the equal protection standards applied by the Court in *Zablocki* v. *Redhail*, ... U. S. ....., 46 U. S. L. W. 4093 (1/17/78) or by the due process standards

suggested by Mr. Justice Stewart's concurring opinion in the same case, the Illinois Funeral or Burial Trust Fund Act cannot stand scrutiny.

The sole avowed purpose of the Act is to provide for the security of the funds necessary to insure the delivery of the purchased merchandise *in futuro*. In upholding the statute's constitutionality the court below relied on *Memorial Gardens Association, Inc.* v. *Smith*, 16 Ill. 2d 116, 156 N. E. 2d 587 and characterized the legislative aim as "recognizing the opportunities for fraud and risk of insolvency inherent in this plan of business operation." Moreover, the Illinois Supreme Court in *Memorial Gardens Association, supra*, defined the statutory classification thusly:

> In view of the provisions of the Insurance Code regulating the manner in which burial societies may conduct their business and those of the Cemetery Care Act, the provisions of the Act in question requiring the deposit of funds in trust to guarantee contract performance are not unusual. *There is nothing unique in requiring one who contracts in futuro to give security for that performance.* (Emphasis added.)

But the Insurance Code [Ill. Rev. Stat. 1975, Chap. 73 § 958 (1)] merely provides: "The society shall not use more than sixty-five percentum of such premium or assessment for the purpose of paying commissions, salaries and other expenses of operation and the surplus shall constitute the benefit account of the society and shall be retained in cash or invested in accordance with Article III." And the relevant parts of the Cemetery Care Act [Ill. Rev. Stat. 1975, Chap. 21 § 64.4] provides: "that not less than the following amounts will be set aside and deposited in trust: 1) For graves, 20% per square foot of the space sold or 15% of the sales price, whichever is the greater . . .; 2) For a crypt not less than 10% of the sales price . . .; 3) For a niche, not less than 10% of the sales price . . ."

The question here is not whether the nature of appellant's vault business makes it a proper object for regulation. The question here is whether the 100% trusting requirements of the Act bear even a semblance of rational *nexus* with the objective intended by the statute. We would not—and we could not—question the validity of the Act if, like the "Burial Societies Act" [*ante* 8] it regulated akin to the provision that "the society shall not use more than 65% . . . for the purpose of paying commissions, salaries and other expenses of operation". But even under the most rudimentary concepts of generally accepted accounting standards a business stands or falls on its operations as a going concern and the most essential element of a going concern is spendable (not entrusted) working capital whose primary source is from the result of operations. The statute in question absolutely prevents even the possibility that working capital can be generated out of business operations and that is prohibitory rather than regulatory.

We realize that in the context of economic legislation the equal protection test is that "if the classification has some reasonable basis it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality" [*Dandridge* v. *Williams*, 397 U. S. 471, 480 quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. See also, *Idaho Department of Employment* v. *Smith*, ... U. S. ....., 46 U. S. L. W. 3368 and cases cited therein]. But here, the Act fails to even meet this test:

1. The statute purports to regulate the performance of contracts *in futuro* and thus classifies appellant in the same category as persons subject to such statutes as the Illinois Insurance Code provisions regulating burial societies [*Ante* 11].

2. The Funeral or Burial Trust Fund Act requires appellant to entrust the entire amount of its gross receipts even though the thing to be delivered *in futuro* requires less than 35% thereof.

3. Thus, the 100% entrusting provisions of the Act bear no rational relationship to the legislative objective and are otherwise violative of the Equal Protection Clause of the Fourteenth Amendment.

The irrationality of the statute clearly emerges from the following:

1. Assume gross yearly vault revenues of $10,000.

2. Assume delivery *in futuro* under current contracts to be 20 years hence.

Under the Act the entire $10,000 would have to be entrusted despite the fact that sole legislative aim is to protect only $3,500 thereof. And under Section 4 of the Act [App. C] even the interest on the entrusted $10,000 must be left on deposit until performance *in futuro*. Compounded at 6% per annum, the deposit at the end of 20 years would amount to $32,000 even though the thing to be secured remains the same—no more than $3,500.

In his concurring opinion in *Zablocki* v. *Redhail*, ... U. S. ....., 46 U. S. L. W. at 4099, Mr. Justice Stewart suggested a substantive due process approach in situations such as this and defined the test to include "the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between the legislative means and purpose, the existence of alternative means for effectuating the purpose and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen". In this context the Illinois Funeral or Burial Trust Fund Act again fails the test:

1. The interest affected is appellant's "liberty" and "property" rights to engage in an admittedly lawful business and it is affected to the extent of outright denial under the Act.

2. As has already been demonstrated "the rationality of the connection between legislative means and purpose" is wholly nonexistent.

3. The findings of the Report to the Federal Trade Commission [*ante* 6] and the 35% deposit provisions of the Illinois Insurance Code [*ante* 8] show, *inter alia*, that alternative means are readily available.

4. Without impugning legislative motive, the effect of the Act is to create an anti-competitive at-need market in favor of "traditional (at-need) funeral industry members" [*ante* 6] and in light of this fact there is necessarily a low "degree of confidence . . . that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen."

CONCLUSION.

For the foregoing reasons, and for others implicit therein, we believe that the questions presented by this appeal are substantial and that they involve matters of public importance.

Respectfully submitted,

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APPENDIX

APPENDIX A.

THE PEOPLE *ex rel.* GEORGE W. LINDBERG, Comptroller, Plaintiff-Appellant, v. MEMORIAL CONSULTANTS, INC., *Defendant-Appellee.*

Third District No. 76-439

Reversed and remanded.

Opinion filed July 29, 1977.—Rehearing denied August 30, 1977.

cite as 50 Ill. App. 3d 1005, 366 N. E. 2d 127

Appeal from the Circuit Court of Peoria County; the HON. CHARLES W. IBEN, *Judge, presiding.*

William J. Scott, Attorney General, of Chicago (Imelda Terrazino, Assistant Attorney General, of counsel), for appellant.

John E. Cassidy, Jr., and Roy P. Hull, both of Peoria, for appellee.

MR. PRESIDING JUSTICE STENGEL delivered the opinion of the court;

George Lindberg as Comptroller of the State of Illinois brought this action to enforce the licensing provisions of the funeral or burial funds act (Ill. Rev. Stat. 1975, ch. 111½, par. 73.103) against Memorial Consultants, Inc., an Illinois corporation doing business in this state. The act provides that persons who sell funeral merchandise under a prepayment plan must hold the proceeds of sale in trust and must be licensed by the Comptroller. This enforcement action sought an injunction to prevent defendant from doing business without a license and also sought an accounting of all sums received under prepaid contracts since 1955. Defendant filed a general denial and an

affirmative defense alleging that the statute violates defendant's constitutional rights because it is confiscatory.

At an early stage of the proceedings the Illinois State Funeral Directors Association was permitted to intervene as a party plaintiff. Defendant filed a countercomplaint claiming in count I that the members of the association have combined to eliminate competition and to restrain retail trade of burial vaults in violation of the Illinois Antitrust Act (Ill. Rev. Stat. 1975, ch. 38, par. 60–3(2)). Count II of the countercomplaint asserted a cause of action under 42 U. S. C. § 1983 for deprivation of constitutional rights resulting from enforcement of the funeral or burial funds act and prayed for an injunction restraining enforcement of the act. The intervenors then withdrew from the suit, and the trial court dismissed count I of the countercomplaint, and also dismissed count II as to all counterdefendants except George Lindberg.

The cause was submitted to the court upon a stipulation of facts, and the Circuit Court of Peoria County entered judgment for defendant. Lindberg then filed this appeal.

Section 1 of the funeral or burial funds act (Ill. Rev. Stat. 1975, ch. 111½, par. 73.101) provides as follows:

> "Any payment of money made to any person, partnership, association or corporation upon any agreement or contract, * * * which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons whose body or bodies are to be so disposed of, shall be held to be trust funds, and the person, partnership, association or corporation receiving said payments is hereby declared to be a trustee thereof."

Section 2 of the act requires the trust funds to be deposited in the name of the trustee, as trustee, within 30 days after

receipt, and section 3 requires such trustees to obtain a State license from the Comptroller.

Defendant is engaged in the business of selling burial vaults. During 1972-74, defendant entered into approximately 9,000 contracts for the sale of vaults with gross receipts of $1,250,000, not all of which represented vault sales. The contracts provide for monthly installment payments of the purchase price and also provide that within 60 days after payment of the full purchase price, upon the purchaser's ~~request~~ request, defendant will deliver the merchandise purchased subject to the following conditions:

> "(a) The furnishing of or the delivery date for the merchandise and/or services designated as purchased is in no way dependent upon YOUR death or upon the death of any other person or persons.
>
> (b) YOU will within sixty (60) days after payment in full request delivery of the merchandise and services designated as purchased in the "Declarations" and [defendant] agrees that within a reasonable time following receipt of said request it will deliver to YOU said merchandise and services anywhere within the area designated in the "Declarations" at no additional cost to YOU.
>
> (c) YOU may use any or all of the merchandise and services purchased for any purpose whatsoever and for the benefit of any person or persons YOU may designate."

The contract also provides that, if the purchaser does not request delivery within 60 days following payment in full, defendant will hold the present-day cost of the merchandise in the purchaser's name. If the cost of merchandise has increased by the date of delivery, the purchaser must pay the additional cost, and if the cost has declined, the purchaser will receive a rebate.

Plaintiff Lindberg raises two issues on appeal. First, do defendant's contracts come within the purview of the statute, and second, is the statute constitutional as applied to defendant?

Defendant contends here, as in the trial court, that the statute does not apply to its sales because delivery of the vaults

is at the request of the purchaser and is not dependent upon the death of any person. We note that the parties have stipulated that the only practical and reasonable use of a burial vault is to contain a coffin, and that defendant's president knew of no instance where a vault was delivered and burial did not take place. It is apparent that in the usual course of defendant's business, vaults are delivered at the time of burial of a decedent.

Confronted with this same argument under a similar statute, the Supreme Court of Tennessee said:

> "[O]nly a rare and eccentric individual would in person, or through an agent, purchase for himself a coffin and grave clothes before he died. Human nature is such that the individual revolts at acquiring and possessing during his lifetime such gruesome tokens of his end. A person, not abnormal, would not have such things around him during his lifetime.
>
> The nature of a business pursued by anyone is not determined by the things that may possibly be done in that business or by things that possibly have been done. It is determined rather by the usual course of the particular business." *State ex rel. Attorney General* v. *Smith Funeral Service, Inc.* (1940), 177 Tenn. 41, 44, 145 S.W.2d 1021, 1023. Accord, *State ex rel. Londerholm* v. *Anderson* (1965), 195 Kan. 649, 408 P.2d 864.

In the only Illinois case arising under this statute, the contracts also provided for delivery "upon request." Although the issue of applicability of the statute was apparently not contested, the court did observe:

> "The contract does not contemplate that delivery will be made or services rendered until after the death of the purchaser." *Memorial Gardens Association, Inc.* v. *Smith* (1959), 16 Ill. 2d 116, 122, 156 N.E.2d 587.

1. We thus conclude that the provisions for delivery upon request do not change the character of defendant's contracts. These sales agreements are for the purpose of furnishing burial merchandise for future use at a time determinable by the death

of a person to be buried, and as such are governed by the statute.

Defendant also argues that its contracts are outside the scope of the act because, under the terms of the contract, the purchaser can request delivery of a vault for burial of some other person. As plaintiff points out, section 1 of the act is not limited to contracts providing for burial of the purchaser but instead refers to "* * * the death of the person or persons whose body or bodies are to be disposed of * * *."

Defendant also attempts to read a like limitation into section 4 of the act (Ill. Rev. Stat. 1975, ch. 111½, par. 73.104) which prohibits withdrawals of the trust fund "until the death of the person or persons for whose funeral or burial such funds were paid, unless sooner withdrawn and repaid" to the purchaser under the terms of the contract. Again the plain language of this section permits withdrawal of the purchase price either at the death of the beneficiary of the contract or sooner if the purchaser so requests and if the contract so permits. Obviously this means the purchaser may use the burial vault for himself or may designate some other beneficiary.

In *Reserve Vault Corp.* v. *Jones* (1962), 234 Ark. 1011, 356 S. W. 2d 225, the seller of burial vaults argued that an Arkansas statute licensing sellers of prepaid funeral expenses applied only to contracts which are dependent upon the death of the contracting party. The court stated:

> "Of course, a purchaser might have in mind another member of his family when buying the vault, and it might be likewise considered that certainly, in numerous instances the vault *would* be purchased for the benefit of the contracting party. Accordingly, if appellants' view were correct, the same exact contract would be sometimes within the purview of the Act, and sometimes without the purview of the Act, depending upon whether the contracting party purchased the vault in contemplation of his own death, or in contemplation of the death of some member of his family. Such an interpretation would leave the matter in total

> confusion, and would open the door to evasive practices. Actually a purchaser probably would not know for whom the vault was being acquired, the answer to that question depending upon which member of the family first died. At any rate, we find no merit in the contention, and hold that delivery of a vault, under [the contract in question], is conditioned upon a demand made pursuant to a death." 356 S. W. 2d 225, 228. Accord, *Falkner* v. *Memorial Gardens Association* Tex. Civ. App. 1957), 298 S. W. 2d 934.

As the cited authorities indicate, the statutory construction urged by defendant would emasculate the act and defeat the clearly expressed legislative intent to regulate all prepaid burial contracts. Hence, we reject defendant's interpretation.

2. Likewise, defendant cannot avoid operation of the act by an express contractual provision that delivery is not dependent upon the death of any person (see paragraph 5(a) of the contract quoted above). Such a provision is meaningless since it is not only contrary to the usual course of defendant's business, as stipulated by the parties, but in fact is contrary to the obvious purpose and intent of the contract. Also, it is a well-accepted rule that the benefits of a statute may not be waived by an individual in cases where the statute was enacted for the protection of the public generally. *Foreman* v. *Holsman* (1957), 10 Ill. 2d 551, 141 N. E. 2d 31.

The final question is whether the act is constitutional as applied to defendant. Defendant contends that the statute is arbitrary, confiscatory, and unreasonable with no substantial relationship to the public interest sought to be protected. Defendant admits that the burial vault business is a proper object for regulation, but suggests that the requirements that 100% of the purchase price and interest thereon be held in trust makes it impossible to obtain the "working capital" necessary to meet current operating expenses. The cost of the vaults is asserted to be only 35% of the purchase price and the only amount necessary to be secured. Thus, rather than regulatory, the statute is said to be prohibitory.

We first note that section 5 of the act permits the trustee of the funds to receive reasonable expenses and compensation not to exceed 5% of the principal and 5% of the earnings.

3. This same constitutional argument was considered in *Memorial Gardens Association, Inc.* v. *Smith* (1959), 16 Ill. 2d 116, 156 N. E. 2d 587, where the seller of caskets, vaults, grave markers and related services argued that the act was an unwarranted exercise of police power, and was confiscatory of its business in violation of the due process provisions of both the State and Federal constitutions. The court upheld the statute and found that the act regulated the manner in which the business of selling prepaid burial services and merchandise may be conducted but did not prohibit sales in advance of need. Recognizing the opportunities for fraud and risk of insolvency inherent in this plan of business operation, the court stated that such procedure invites regulation of a stringent nature, and then said:

> "Practically, plaintiffs will no longer be able to collect prospective profits in advance, without furnishing an adequate guarantee for performance. However, this does not prohibit the operation of this type of business. A large discretion is necessarily vested in the legislature to determine not only what the interests of the public welfare require, but what measures are necessary to secure such interests. [Citations.] Plaintiffs' argument amounts to an admission that they will be unable to compete with others who sell the same merchandise and services at the time of actual need. However, the public welfare need not be abrogated to enable an individual to carry on his business * * *.

Plaintiffs contend that the act constitutes an unwarranted interference with the right of citizens to contract with each other and thus violates constitutional guarantees of both the State and Federal constitutions. While rights of contract are favored and protected there is no principle of absolute freedom of contract. It is a qualified right and the State may, in its legitimate exercise of the police power, pass laws which limit or affect the right of contract so long

as those regulations are reasonably necessary to secure the health, safety, morals or general welfare of the community. [Citation.] The constitutional guarantee does not withdraw from legislative supervision that department of human activity which consists in the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies only the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. [Citations.] In the exercise of the police power it becomes necessary to prohibit some forms of contract entirely and to restrict others, yet the right to do so is unquestioned when the public welfare demands it. * * * The regulations contained in the present act do not amount to an arbitrary or unwarranted interference with contract rights. The act neither prohibits the right to sell the services or merchandise, nor proscribes advance collections. It does require that such funds, when collected, be set aside for the purpose for which they were intended. The public has a vital interest in securing that result and, insofar as the rights of plaintiffs are affected, those considerations must yield to the paramount public welfare." 16 Ill. 2d 116, 127-29, 156 N. E. 2d 587, 594-95.

Other States with similar statutes have also held them to be constitutional. *State ex rel. Londerholm* v. *Anderson* (1965), 195 Kan. 649, 408 P. 2d 884; *Utah Funeral Directors & Embalmers Association* v. *Memorial Gardens of the Valley, Inc.* (1965), 17 Utah 2d 227, 408 P. 2d 190; *Messerli* v. *Monarch Memorial Gardens, Inc.* (1964), 88 Idaho 88, 397 P. 2d 34; *Reserve Vault Corp.* v. *Jones* (1962), 234 Ark. 1011, 356 S. W. 2d 225; *Falkner* v. *Memorial Garden Assoc.* (Tex. Civ. App. 1957), 298 S. W. 2d 934; *State ex rel. Attorney General* v. *Smith Funeral Service, Inc.* (1940), 177 Tenn. 41, 145 S. W. 2d 1021. Contra, *State* v. *Memorial Gardens Development Corp.* (1957), 143 W. Va. 182, 101 S. E. 2d 425, 68 A. L. R. 2d 1233; *State* v. *Gateway Mortuaries, Inc.* (1930), 87 Mont. 225, 287 P. 156, 68 A. L. R. 1512.

The weight of authority is clear and so is the law of Illinois. The act is constitutional as applied to defendant. The circuit court erred in entering judgment for defendant. We therefore reverse the judgment and remand for further proceedings consistent with this opinion.

Reversed and remanded.

BARRY and SCOTT, *JJ.*, concur.

APPENDIX B.

No. 76-439

IN THE APPELLATE COURT OF ILLINOIS
Third District
A. D. 1977

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE W. LINDBERG, Comptroller of the State of Illinois, *Plaintiff-Appellant,*	Appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County.
vs.	
MEMORIAL CONSULTANTS, INC., *Defendant-Appellee.*	Honorable Charles W. Iben, Judge Presiding.

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Memorial Consultants, Inc., hereby appeals to the Supreme Court of the United States from the opinion and judgment reversing and remanding the judgment of The Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois [*People ex rel. Lindberg* v. *Memorial Consultants, Inc.*, 50 Ill. App. 3d 1005].

This Court's opinion and judgment was entered on July 29, 1977 and thereafter became final on November 23, 1977 when the Supreme Court of Illinois denied petition for leave to appeal which had been timely filed, under Rule 315 of the Rules of the Supreme Court of Illinois [Ill. Rev. Stat., Chap. 100 § 315].

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

Proof of service.

/s/ JOHN E. CASSIDY, JR.,
John E. Cassidy, Jr.,
Attorney for Appellant,
Memorial Consultants, Inc.

APPENDIX C.

STATUTES INVOLVED.

Ill. Rev. Stat., 1969, Ch. 111½, § 73.101:

73.101 Nature of payment.] § 1. Any payment of money made to any person, partnership, association or corporation upon any agreement or contract, or any series or combination of agreements or contracts, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons whose body or bodies are to be disposed of, shall be held to be trust funds, and the person, partnership, association or corporation receiving said payments is hereby declared to be a trustee thereof.

Ill. Rev. Stat., 1969, Ch. 111½, § 73.102:

73.102 Deposit of trust funds.] § 2. All such trust funds shall be deposited in the name of the trustee, as trustee, within 30 days after receipt thereof, with either a bank or trust company authorized to do business in the State of Illinois, or a Federal Savings and Loan Association or Illinois Savings and Loan Association where investments are protected by the Federal Savings and Loan Insurance Corporation. The trustees at the time of making deposit shall furnish to the depositary the name of each payor, and the amount of payment on each such account for which deposit is being so made. As amended by act approved July 7, 1965. L. 1965, p. 1284.

Ill. Rev. Stat., 1969, Ch, 111½, § 73.103:

73.103 License — Necessity — Applications — Bond — Records — Annual report — Investigation of records— Revocation and surrender of license.] § 3. No person, firm, partnership, association or corporation may act as

trustee without first securing from the Auditor of Public Accounts (hereafter called the Auditor) a license to so act. Application for such license shall be in writing, signed by the applicant and duly verified in forms furnished by the Auditor. Each application shall contain at least the following: (1) The full name and address (both residence and place of business) of the applicant, and every member, officer and director thereof if the applicant is a firm, partnership, association or corporation. Any license issued pursuant to the application shall be valid only at the address stated in the application for such applicant or at such new address as may be approved by the Auditor; (2) a detailed statement of the applicant's assets and liabilities; and (3) applications for license shall be accompanied by a fidelity bond executed by the applicant and a surety company authorized to do business in this State in such amount not exceeding $10,000 as the Auditor may require. Upon receipt of such application and bond the Auditor shall issue a license unless he shall determine that the applicant has made false statements or representations in such application, or is insolvent, or has conducted or is about to conduct his business in a fraudulent manner, or is not duly authorized to transact business in this State. Such license shall be kept conspicuously posted in the place of business of the licensee. The Auditor may require additional bond from time to time in amounts equal to one-tenth of such trust funds, which bond shall run to the Auditor for the use and benefit of the beneficiaries of such trust funds. Such licensee may be written permit of the Auditor, be authorized to operate without additional bond, except such fidelity bond as may be required by the Auditor for the protection of the licensee against loss by default by any of its employees engaged in the handling of trust funds. The licensee shall keep accurate accounts, books and records in this State of all transactions, copies of all agreements, dates and amounts of payments made and accepted thereon, the names and addresses of the contracting parties, the persons for whose benefit such funds are accepted, and the names of the depositaries of such funds. The licensee shall make reports to the Auditor annually or at such other time as the Auditor may require, on forms furnished by the Auditor. Every application shall be accompanied by a fee of $10.00 and every report shall be accompanied by a fee of $2.00. The licensee shall make all such books and records pertaining to such trust funds available to the Auditor for examination. The Auditor, or a qualified person designated by him, may at any time investigate the books, records and accounts of the licensee with respect to its trust funds and for that purpose may require the attendance of and examine under oath all persons whose testimony he may require. The cost of such examination shall be borne by the licensee. In the event such investigation or other information received by the Auditor discloses a substantial violation of the requirements of this Act, the Auditor shall revoke the license of such person. Such licensee may terminate all further responsibility for compliance with the requirements of this Act by voluntarily surrendering his license to the Auditor, or in the event of its loss, furnishing the Auditor with a sworn statement to that effect, which states his intention to discontinue acceptance of pre-burial funds. Such license or statement must be accompanied by an affidavit that said licensee has lawfully expended or refunded all pre-burial funds accepted by him, and that he will accept no additional pre-burial funds. The Auditor shall immediately cancel or revoke said license. As amended by act approved July 7, 1965. L. 1965, p. 1284.

Ill. Rev. Stat., 1969, Ch. 111½, § 73.104:

73.104 Withdrawal of funds.] § 4. The amount or amounts so deposited, with interest thereon, if any, shall not be withdrawn until the death of the person or persons for whose funeral or burial such funds were paid, unless sooner withdrawn and repaid to the person who originally paid the money under or in connection with said agreement or series of agreements, or to his or her legal representative; provided, that if the agreement or series of agreements provides for forfeiture and retention of any or all payments by reason of default in payment upon and according to the terms thereof, then upon any such default and forfeiture the trustee may withdraw such deposits; and further provided, nothing herein contained prohibits the change of depositary by the trustee and the transfer of trust funds from one depositary to another.

APPENDIX D.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

REPORT OF THE PRESIDING OFFICER ON PROPOSED TRADE REGULATION RULE CONCERNING FUNERAL INDUSTRY PRACTICES

[16 C. F. R. Part 453]

[Public Record 215-46]

This report, required by Section 1.13(f) of the Commission's Rules of Practice, contains the Presiding Officer's summary of the public record and initial findings and conclusions with regard to those issues designated by the Presiding Officer and such other findings and conclusions as he sees fit. The report has not been adopted or reviewed on the merits by the Bureau of Consumer Protection or reviewed or adopted by the Commission. The Commission's final determination in this rulemaking proceeding will be based upon the record taken as a whole, including this report by the Presiding Officer, the report and recommendations prepared by the staff under Section 1.13(g) of the Rules of Practice, and comments upon these reports received during the 60-day period after the staff report has been placed on the public record.

JACK E. KAHN,
Presiding Officer.

July 1977

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UNITED STATES OF AMERICA BEFORE
FEDERAL TRADE COMMISSION

In the Matter of Proposed Trade Regulation Rule Concerning Funeral Industry Practices

[16 CFR Part 453]

Public Record
File No. 215-46

Findings and Conclusions with Respect to Issues
by: Jack E. Kahn, Presiding Officer

I. INTRODUCTION AND GENERAL ISSUES RELATING TO THE PROCEEDINGS.

A. Preface

On August 29, 1975, the Commission published its initial notice of a proposed Trade Regulation Rule Concerning Funeral Industry Practices.[1] Some years prior to the publication of that notice, the staff of the Bureau of Consumer Protection began an investigation of funeral industry practices which resulted in a staff report containing the results of the investigation and the proposal of a rulemaking proceeding.[2] That staff report formed in large part the basis of the Commission's action in proposing the trade regulation rule for the funeral industry (hereinafter referred to as the proposed rule).

Consistent with that initial notice, the record of the proceeding was opened for comments both on the practices toward which the proposed rule was directed as well as the staff report upon which it was largely based. The response to the call for comment illustrated widely divergent attitudes toward the proposed rule. Generally, comments from industry sources were strongly opposed to the proposed rule. Some consumers were also op-

1. 40 Fed. Reg. 39901, August 29, 1975.

2. FTC Staff Memorandum, Record VI-D-41.

posed. Many consumers and consumer representative groups commented favorably upon the proposed rule. All of these comments are now a part of the record.

State regulatory boards have increased educational requirements as a prerequisite to licensure with the result that entry into this market its restricted, particularly the immediate disposal services whose owners or operators may not be able to pass the increased qualifications for a license.

Issue No. 30

"Pre-need sales. (a) Can funeral consumers obtain lower prices and avoid problems associated with at-need sales by making funeral arrangements in advance of need?"

"(b) Has the availability of before-need arrangements been restricted in ways which injure rather than protect consumer interests, by State laws or regulations, or by actions of funeral service industry members of trade associations?"

In its Statement of Reason for the proposed rule, the Commission stated that it has reason to believe that "Actions by funeral industry members to inhibit economical funeral offerings, pre-need arrangements, immediate disposition services, or memorial societies disadvantage consumers by restricting their choice of funeral arrangements and may suppress competition in that industry."[93]

The question of pre-need planning of one's own funeral as opposed to at-need sales to the survivors received considerable attention during this proceeding.

Consistently raised was the question of who should make the determination as to type of funeral, the subject of the ceremony (obviously) before demise or the survivors after demise. While the legal right to enforce such arrangements may vary with the jurisdiction,[94] pre-arrangement provides the con-

93. 40 Fed. Reg. 39905.

94. *See, e.g.*, testimony of Byron D. Sher, professor of law, Tr. 7530-31.

sumer with peace of mind in that the final arrangements have been made to one's satisfaction at satisfactory prices. Eliminated is any guess as to what the deceased desired.

A number of objections have been raised to pre-need planning and firm pre-arrangement of funerals. One argument is the mobility of people in our society which has been commented on previously.[95] Some purchasers do not move a great distance and thus could obtain the benefits of the pre-need contract by remaining in the vicinity. Additionally, pre-need contracts have been drawn to allow for refunds or for reciprocal honoring of contracts at convenient locations.[96]

An argument was raised that some people would make bizarre arrangements to spite the survivors.[97] This may be one of the risks of a free society. Furthermore, pre-arranged funerals may be made by families together after consideration of all the alternatives.[98] Pre-arrangement for many people affords the opportunity to face death and plan for it without leaving this task to survivors.

Some people change their minds about the types of funeral they want after entering into a pre-need arrangement.[99] If that is the case such contracts may be changed by mutual agreement.

An important consideration, perhaps above many others, is the concept of freedom of choice. While this can mean the freedom to choose a "traditional" at-need funeral, it should also include the freedom to arrange prior to death one's own

95. *See, e.g.,* testimony of Mildred Damiano, funeral director, Tr. 1305-06.

96. *See* testimony of John Lawton, president, Sierra Memorial Services, Inc., Tr. 6489-92.

97. Testimony of Robert P. Shackelford, Jr., funeral director, Tr. 9058-60.

98. Rebuttal submission of Prearrangement Interment Association of America, Record X-6, Part II, p. 5.

99. *See, e.g.,* testimony of H. E. Burton, president, Palm Memorial Estate Plans, Tr. 6643 and testimony of Patrick J. Farmer, funeral director, Tr. 2301-02.

services without having the availability of such services restricted by law, regulation or peer pressure, provided such arrangements do not offend public policy or sensibilities.

Those who sell funerals on a pre-need basis feel that the funeral industry as a whole today does not advocate and does not actively engage in pre-need sales.[100] In fact, the industry actively supports legislation to restrict pre-need sales. Representative H. Lynn Jondall, Michigan House of Representatives, discussed techniques used by the Michigan Funeral Directors Association to prohibit the development of pre-need programs.[101]

There is little evidence in the record of the proceeding to support a finding as to whether consumers can obtain lower prices by making funeral arrangements in advance. There are, however, benefits, albeit noneconomic, as previously discussed: the exercise of freedom of choice without the time pressures and disorientation which are usually present in a sale at-need.

The record contains numerous statements from witnesses in regard to the sales tactics and pressures employed by pre-need arrangement salespersons.[102] As a result, the at-need funeral industry has sponsored and supported state laws which prevent the solicitation of consumers for the purchase of funeral service merchandise before death.[103] While there may be some evidence of improper sales tactics and pressures, it taxes credulity to insist that such pressures cannot be handled better before-need than in the at-need situation. The opening of this market would protect consumers from any possibility of pressure at a trying moment in their lives. The consumer, makin[illegible] a purchase with

100. *See, e.g.,* Prearrangement Interment Association of America, note 98 *supra,* at Part II, p. 7.

101. Tr. 4079.

102. *See, e.g.,* testimony of Roger I. Dyer, funeral director Tr. 1556.

103. *See, e.g.,* written submission of Prearrangement Interment Association of America, at volumes I-III and testimony of Robert W. Ninker, executive director, Illinois Funeral Directors Association Tr. 2711-13.

a great deal of time, with opportunity to investigate alternatives and comparison shop and to become acquainted with what may be unfamiliar products and services, is more capable of dealing with this problem. Since most pre-need sales are made in the home, the cooling-off period is available and, in fact, many practitioners offer from 10 to 30 days in order to rescind the entire transaction.[104] The record indicates that only 30 percent of prospective pre-need purchasers actually sign contracts at the time they are visited by a salesperson.[105] The opportunity to decline is not available in the at-need situation.

Among the devices used by the funeral industry to restrict pre-need sales are state laws and regulations that require a 100 percent burial trust fund deposit of pre-need funds.[106] The at-need funeral industry position was virtually unanimous: that a 100 percent deposit requirement is necessary and the consumer must have an unlimited right to a refund of the entire amount.[107] The reasons for this are to protect the consumer and insure the seller's ability to deliver at a future time.[108]

If a seller must deposit 100 percent of the sales price of a pre-need contract, he will have no funds to pay overhead, particularly salaries and commissions until a distant future date, when a demise occurs, the contract is performed and the funds released from trust. Without funds to pay overhead, prospective sellers of pre-need funerals will not enter this market.

If a seller must refund the total sales price (plus interest in some cases) upon request of the contracting consumer, then he

104. *See* Burton, note 99 *supra,* at 6670.

105. *Id.*

106. *See, e.g.,* Prearrangement Interment Association of America, note 98 *supra,* at volumes I-III and testimony of Robert Coats, funeral director and president, Michigan Funeral Directors Association, Tr. 3785-86.

107. *See, e.g.,* testimony of Edward J. Fitzgerald, Funeral Director and past President, NFDA, and testimony of Mark Waterston, funeral director, Tr. 3746-47.

108. *See, e.g.,* Fitzgerald, *id.*

has only the possibility of that future income. Direct home sellers of pre-need funeral merchandise cannot subsidize sales for many years, particularly when the contract can be rescinded unconditionally.[109] As a consequence, if a seller will not sell, the consumer is deprived of the opportunity to choose freely among alternatives which should be available to him.

As to protecting the consumer by virtue of the 100 percent depository requirement, one funeral industry argument is that such a requirement protects the consumer from fraud.[110] A number of frauds have taken place in pre-need sales. In each instance of fraud or non-performance the cause of defalcation was not the percentage deposited under state law, but rather that funds were never deposited at all, a risk not anticipated by the 100 percent trust fund law. In states that require a 100 percent deposit and a 100 percent refund upon the changing of the mind of the consumer, there are few administrative procedures in operation such as licensing or auditing which would insure compliance with this law. As a result, the state laws as presently written inhibit the honest vendor and do not control the dishonest.

If a 100 percent requirement is excessive, what then is an appropriate actuarially based requirement? An official of the Comptroller of the State of Illinois made a study of the burial trust law in Illinois with a view toward new legislation in this area.[111] As a part of that study, an actuarial analysis was pre-

109. *See, e.g.,* statement of D. W. Necomer, IV, D. W. Necomers Sons, Record 215-46-1-29-9, No. 92, p. 3, testimony of Roger C. Nauert, executive assistant to the comptroller of the State of Illinois, Tr. 3680, Lawton, note 96 *supra,* at 6510, Burton, note 99, *supra,* at 6643-48, testimony of Paul Butler, Funeral Security Plans, Inc., Tr. 12818 and testimony of Richard Myers, Chairman of the Utah State Board of Funeral Directors and Embalmers who stated, "If there had been a 100 percent law, the [pre-need] firm never would have been selling the program." Tr. 8327.

110. *See, e.g.,* Fitzgerald, note 107 *supra,* at 6295 and testimony of Myers, note 109 *supra,* at 8326-27.

111. *See* Prearrangement Interment Association of America, note 100 *supra,* at Part II, pp. 15-17.

pared for the Illinois Cemetery Association by Risk Mangement Consultants, a technical service of Marsh & McLennan.[112]

The study indicates that the deposit of the current *cost* (not the sales price) of merchandise or services, assuming a 6 percent return and 6 percent inflation rate, would provide adequate funds to deliver such goods and services at any given time in the future. Results will vary as assumptions vary. The study, however, substantiates the position that a 100 percent deposit is not necessary as a requirement to guarantee delivery of promised funeral goods and services at a later date. Some states have already enacted laws requiring less than 100 percent with no apparent problems resulting from that aspect of these laws.[113]

Summary: The funeral consumer can avoid problems associated with at-need sales by making funeral arrangements in advance of need. His opportunity to do so is presently restricted by the 100 percent trust fund laws as well as the antisolicitation statutes. These restrictive laws have been sponsored by traditional (at-need) funeral industry members.

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112. *Id.* at Part II, Exhibit A.

113. *See* Lawton, note 96 *supra*, at 6456-60, 6511.

Supreme Court, U. S.
FILED
MAY 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1185

MEMORIAL CONSULTANTS, INC.,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE W. LINDBERG, Comptroller of the State of Illinois,

Appellee.

On Appeal from the Appellate Court of Illinois, Third District

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1185

MEMORIAL CONSULTANTS, INC.,

Appellant,

VS.

PEOPLE OF THE STATE OF ILLINOIS ex rel. GEORGE W. LINDBERG, Comptroller of the State of Illinois,

Appellee.

On Appeal from the Appellate Court of Illinois, Third District

MOTION TO DISMISS

MOTION TO DISMISS

The appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the appeal herein on the grounds that the appeal fails to present a substantial federal question and that the decision below is so plainly correct as to warrant no further review.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third District, is reported at 50 Ill. App. 3d 1005, 366 N.E. 2d 127 (1977), and is reproduced in Appendix A of appellant's Jurisdictional Statement.

JURISDICTION

These proceedings were instituted when the appellee filed a complaint in the circuit court of Illinois, seeking compliance by appellant with the provisions of the Illinois Funeral or Burial Funds Act. (Ill. Rev. Stat., 1969, Ch. 111½, §§ 73.101-73.108) Appellant denied that the Act applies to its sales of burial vaults and affirmatively asserted that, if applied to its business, the Act violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The circuit court entered a final judgment in favor of appellant without making any findings.

On appeal, the Illinois Appellate Court, Third District, held that the Act applies to appellant's sales, and that the Act is constitutional as applied to appellant. The Appellate Court denied a petition for rehearing on August 30, 1977. The Illinois Supreme Court denied appellant's petition for leave to appeal on November 23, 1977, and its motion for

reconsideration on January 9, 1978. Appellant filed its Notice of Appeal to the Supreme Court of the United States on February 15, 1978. The case was docketed in this Court on February 21, 1978.

Appellant has invoked the jurisdiction of this Court to review the decision of the Illinois Appellate Court, Third District, by virtue of 28 U.S.C. §§ 1257 (2) and 2101 (C).

QUESTION PRESENTED

Is the Illinois Funeral or Burial Funds Act a constitutional exercise of the state police power insofar as it requires that persons who sell funeral merchandise in advance of need hold the proceeds of sale in trust.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment XIV;
Ill. Rev. Stat., 1969, Ch. 111½, §§ 73.101 - 73.108;
Ill. Rev. Stat., 1977, Ch. 21, § 64.2;
Ill. Rev. Stat., 1977, Ch. 21, § 64.4;
Ill. Rev. Stat., 1977, Ch. 73, §§ 951-58.

STATEMENT OF THE CASE

Appellee brought this action as Comptroller of the State of Illinois to enforce the provisions of the Funeral or Burial Funds Act (Ill. Rev. Stat., 1969, Ch. 111½, Sections 73.101 et seq.) against appellant, Memorial Consultants, Inc., an Illinois corporation engaged in the business of selling burial vaults prior to need. Section 1 of the Act provides:

> Any payment of money made to any person, partnership, association or corporation upon any agreement or contract, . . . which has for a purpose . . . the furnishing or delivery of any personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, for future use at a time determinable by the death of the person or persons whose body or bodies are to be disposed of, shall be held to be trust funds, and the person, partnership, association or corporation receiving said payments is hereby declared to be a trustee thereof. (Ill. Rev. Stat., 1969, Ch. 111½, § 73.101)

Section 2 of the Act requires the trust funds to be deposited in the name of the trustee within 30 days after receipt. Section 3 requires such trustee to obtain a license from the state comptroller. Section 5 permits the trustee to receive reasonable expenses and compensation not to exceed 5% of the principal and 5% of the earnings of the funds deposited.

The complaint sought an injunction to prevent appellant from doing business without a license; also an accounting of sums collected in violation of the Act and a decree requiring appellant to deposit these sums as required by statute. Appellant denied that it was subject to the Act and affirmatively asserted that the statute, if applied to

appellant, is confiscatory and therefore violates its rights under the due process and equal protection clauses of the Fourteenth Amendment.

The trial court permitted the Illinois State Funeral Directors to intervene as a party plaintiff. Appellant filed a counterclaim alleging in Count I that the association members have combined to eliminate competition and to restrain retail trade of burial vaults in violation of the Illinois Antitrust Act (Ill. Rev. Stat., 1975, Ch. 38, § 60-3). Count II of the countercomplaint asserted a cause of action under 42 U.S.C. § 1983 for deprivation of constitutional rights resulting from enforcement of the Act. After the intervenors were allowed to withdraw, the trial court dismissed without prejudice Count I of the counterclaim, and dismissed Count II as to all counterdefendants except appellee.

The cause was submitted to the trial court upon a stipulation of facts[1] which included the following:

> 1) Appellant uses a contractual agreement to sell burial vaults; burial vaults are merchandise used in connection with the final disposition of a dead human body.

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1. Appellant erroneously asserts that the facts stated on page 4 of the Jurisdictional Statement were stipulated to or admitted by the pleadings. Except as restated above, all of these "facts" were simply allegations contained in appellant's own pleadings, either in Count I of the counterclaim which the trial court dismissed, or in Count II of the counterclaim to which appellee pleaded insufficient knowledge. Under the Illinois Civil Practice Act, Ill. Rev. Stat., 1975, Ch. 110, Section 40, an answer based on want of knowledge is an alternative to a denial and does not constitute an admission. *In re Estate of Pecoulas*, 98 Ill. App. 2d 440, 240 N.E. 2d 311, 313 (1968).

2) Generally several years time elapses between the completion of payment under the contract and delivery of a burial vault.

3) During the years 1972, 1973 and 1974, appellant entered into some 9,000 such agreements; during these same years a substantial number of the contracts were performed.

4) A funeral normally follows the delivery of a burial vault under appellant's contract; appellant's president knew of no instance in which a burial did not occur when delivery was made.

5) Appellant is not licensed by the state comptroller.

The parties filed written briefs in the trial court regarding the questions of whether appellant's contract is covered by the terms of the Funeral or Burial Funds Act and whether the Act is constitutional. Based on all of the pleadings, the stipulated facts and the written briefs, the trial court entered a judgment order on July 19, 1976 finding for appellant "in bar of plaintiff's cause of action."

On July 29, 1977, the Illinois Appellate Court, Third District, reversed the judgment of the trial court and remanded the cause for further proceedings. The Appellate Court held that the Act applies to appellant's sales despite its contractual provisions allowing delivery of burial vaults upon request and also allowing the purchaser to request delivery for burial of some other person. The Court also held that the Act was constitutional. The appellate court essentially relied on *Memorial Gardens Ass'n., Inc.* v. *Smith,* 16 Ill. 2d 116, 156 N.E. 2d 587 (1959), appeal dismissed 361 U.S. 31, wherein the Illinois Supreme Court had found that the Act is a valid exercise of the state police power in that the Act regulates, and does not prohibit, the business of selling prepaid burial merchandise.

The appellate court denied appellant's petition for rehearing on August 30, 1977. The Illinois Supreme Court denied appellant's petition for leave to appeal on November 23, 1977, and its motion for reconsideration on January 9, 1978.

ARGUMENT

THE REQUIRMENT OF THE ILLINOIS FUNERAL OR BURIAL FUNDS ACT THAT PERSONS WHO SELL FUNERAL MERCHANDISE IN ADVANCE OF NEED HOLD THE PROCEEDS OF SALE IN TRUST IS A CONSTITUTIONAL EXERCISE OF THE STATE POLICE POWER.

A.

The Trust Provisions Of The Act Do Not Violate Appellant's Rights Under The Due Process Clause.

Neither appellant's property rights nor its right to make contracts are absolute; "[e]qually fundamental with the private right is that of the public to regulate it in the common interest." *Nebbia* v. *New York,* 291 U.S. 502, 78 L. Ed. 940, 949 (1933).

Appellant acknowledges that the business of selling burial merchandise is a proper subject for regulation in the exercise of the state police power. (Jurisdictional Statement, p. 8) Because of the public's vital interest in the proper disposition of its deceased members' bodies, persons engaged in this business have traditionally been subjected to rigorous regulation. *Memorial Gardens Ass'n. Inc.* v. *Smith,* 16 Ill. 2d 116, 156 N.E. 2d 587, 593 (1959), appeal dismissed 361 U.S. 31. The exercise of the police power is particularly warranted where pre-need contracts like the present do not anticipate any performance whatsoever by the seller for many years and, in most instances, only after the death of the purchaser. *Id.* at 592, 594.

The police power is clearly the most essential and "always one of the least limitable of the powers of the government." *Eubank* v. *City of Richmond,* 226 U.S. 137, 143, 57 L. Ed. 156 (1912). In exercising the power, the legislature is necessarily vested with broad discretion to determine not only what the interests of the public welfare require, but what measures are necessary to secure those interests. *Terrace* v. *Thompson,* 263 U.S. 197, 217, 68 L. Ed. 255 (1923). Due process demands only that legislation "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U.S. 502, 78 L. Ed. 940, 950 (1933). Even this standard is not applied with strict precision since, where a legislative determination is debatable, the legislative judgment must be allowed to control. *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 8 L. Ed. 2d 130, 134 (1962). Legislation cannot be refused application as arbitrary and capricious merely because it is deemed in a particular case to work an inequitable result; *Wickard* v. *Filburn,* 317 U.S. 111, 87 L. Ed. 122, 137 (1942); rather, the exercise of the police power will be upheld if any state of facts "either known or which could be reasonably assumed affords support for it." *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 8 L. Ed. 2d 130, 135 (1962).

The trust provisions of the Illinois Funeral or Burial Funds Act have a substantial relation to the object sought to be attained by the Act. The evils inherent in pre-need burial contracts have generally been identified as follows. The transaction under the contract does not constitute a present sale, since delivery of merchandise is almost always made after the purchaser's death. On the contract date, the merchandise is not necessarily in the possession of the company nor even in existence. For a period as indefinite as life, the company has possession and control of the purchase money, setting aside only sufficient funds to

pay for the present day cost of the merchandise. Even this indefinite sum is not set aside until the installment contract is paid in full, and the income earned from these funds are to be used for the "best interests of the company." The agreement does not advise purchasers that the greater part of the funds are to be used for operational expenses and commissions. The company collects a service charge from the purchaser, but is not required to make any expenditure whatsoever until some time after request for delivery. In the long interval between full receipt of the purchase price and contract performance, the possibilities of fraud "are great and risk of insolvency, with consequent inability to perform, apparent." *Memorial Gardens Ass'n. Inc.* v. *Smith,* 16 Ill. 2d 116, 156 N.E. 2d 587, 594 (1959), appeal dismissed 361 U.S. 31. Even thought appellant claims it is necessary to deduct almost two-thirds of the purchase price for expenses, and to retain only one-third to cover actual future commitments, appellant assumes no risk regarding an increase in the cost of the merchandise. "Such procedure invites regulation of a stringent nature." *Messerli* v. *Monarch Memorial Gardens, Inc.*, 397 P. 2d 34 (Idaho Sup. Ct. 1964).

The measures used by the Illinois legislature to protect the public interest are reasonable. The Illinois Act does not prohibit pre-need sales, but simply regulates the manner in which appellant may conduct its business. The Illinois legislature has determined that all funds collected under pre-need contracts must be deposited as trust funds, except that the trustee may be reimbursed for reasonable expenses not to exceed 5% of the principal fund and 5% of the fund's earnings. Ill. Rev. Stat., 1969, Ch. 111½, §§ 73.101, 73.105. These trust fund provisions were designed to "assure the purchasers that the company will be able to complete their contracts when the time for performance arrives" *Memorial Gardens Ass'n., Inc.* v. *Smith,* 156 N.E.

2d at 593. It would be highly "unusual to expect or require prospective purchasers to furnish or advance capital funds necessary for the operation of [appellant's] business." *Id.* at 594. The facts that appellant has difficulty conducting its business under the Act, or that the Act might indirectly favor at-need sellers of funeral merchandise, do not render it unconstitutional. This Court has stated that while statutes prohibiting monopolies have been upheld, "[o]n the other hand, where the policy of the state dictated that a monoply should be granted, statutes having that effect have been held inoffensive to the constitutional guaranties." *Nebbia* v. *New York,* 291 U.S. 502, 78 L. Ed. 940, 953 (1933). Moreover,

> Many companies, indeed whole industries, have been forced out of business by governmental regulation. That regrettable consequence does not, however, establish a denial of due process. (*Texas American Asphalt Corp* v. *Walker,* 177 F. Supp. 315, 327 (S.D. Tex. 1959), citing numerous Supreme Court decisions)

Appellant's complaint that the statute gives no recognition for its current expenses is "largely a criticism of the Act." *Falkner* v. *Memorial Gardens Ass'n.*, 298 S.W. 2d 934, 941 (Tex. Civ. App. 1957). This is equally true regarding the Report issued by the Federal Trade Commission concerning proposed trade regulation rules for the funeral industry, which essentially suggests that the state legislatures could enact less stringent regulations. Such criticism, going merely to the amount of the deposit required, properly relates to legislative policy rather than judicial determination. The Court will not sit as a super-legislature to weigh the wisdom of legislaton, or to invoke the due process clause so as to strike down laws or regulations simply because the courts may believe they are unwise or improvident. *Ferguson* v. *Skrupa,* 372 U.S. 726, 10 L. Ed. 2d 93, 96

(1963). Should practice and experience show that the deposits required under the Act are too large, the Illinois legislature will undoubtedly see fit to change the trust fund requirements. *Union Cemetery Ass'n.* v. *Cooper,* 414 Ill. 23, 110 N.E. 2d 239 (1953).

A number of state courts have directly considered the precise due process question involved here, and have upheld the validity of similar state laws claimed to be confiscatory.[2] In *Messerli* v. *Monarch Memorial Gardens, Inc.,* 397 P. 2d 34, 41 (Idaho Sup. Ct. 1964), the Court stated: "We think unquestionably the legislature, by enacting this statute, had in mind the protection of the public and the prevention of fraud." Likewise, in *Falkner* v. *Memorial Gardens Ass'n.,* 298 S.W. 2d 934, 941 (1957), the Texas Court of Civil Appeals found the fact that the legislature saw fit to impose on the business a regulation that to appellant may seem onerous "will not render the Act unconstitutional because the Legislature acting in the public interest was authorized to impose regulations on the business that operate uniformly on all persons engaged in such business."

In finding the Illinois Act constitutional, the Illinois Supreme Court concluded:

> . . . plaintiffs entered this business by choice . . . Practically, plantiffs will no longer be able to collect prospective profits in advance, without furnishing an adequate guarantee for performance. However, this does not prohibit the operation of this type of business. . . . Plaintiff's argument amounts to an admission that they will be unable to compete with others who sell the same merchandise and services at the time of actual need. However, the public welfare need not be abrogated to enable an individual to carry on his business in the particular manner in which he has elected to proceed. (*Memorial Gardens Ass'n., Inc.* v. *Smith,* 16 Ill. 2d 116, 156 N.E. 2d 587, 594 (1959), appeal dismissed 361 U.S. 31.

2. *See, e.g., State ex rel. Londerholm* v. *Anderson,* 195 Kan. 649, 408 P. 2d 864 (1965); *Utah Funeral Directors & Embalmers Ass'n.* v. *Memorial Gardens of the Valley, Inc.,* 17 Utah 2d 227, 408 P. 2d 190 (1965); *Reserve Vault Corp.* v. *Jones,* 234 Ark. 1011, 356 S.W. 2d 225 (1962); *State ex rel. Attorney General* v. *Smith Funeral Service, Inc.,* 177 Tenn. 41, 145 S.W. 2d 1021 (1940).

Finally, in one of only two cases where pre-need trust fund provisions were invalidated, Mr. Justice Given noted in a vigorous dissent that undertakers have successfully operated such businesses without receiving payment prior to delivery:

> . . . Assuming, however, that the defendant is correct in its contention, must the general welfare of the people of the State be abrogated, and the right to exercise the police power denied the legislature for the purpose of enabling an individual to remain in business? Must the police power of the State depend on such uncertainties . . . Does it not clearly appear that the contention of necessity for immediate deductions from the trust moneys contracted to be paid to the defendant is for the purpose only of pyramiding profits to the heights hoped for, not merely for the purpose of enabling defendant to remain in business? (*State* v. *Memorial Gardens Development Corp.,* 101 S.E. 2d 425 (W. Va. Sup. Ct. of App. 1957) (dissenting opinion)

The above shows that a nexus clearly exists between the interests of the public welfare and the measures chosen to

secure such interests. The fact that the legislature "might have evolved a different or better plan furnishes no reason for invalidating an enactment which represents the collective judgment of the law makers on the subject." *Memorial Gardens Ass'n., Inc.* v. *Smith*, 156 N.E. 2d at 597.

B.

The Trust Provisions Of The Act Do Not Deny Appellant Equal Protection Of The Law.

The Constitution does not require things which are different in fact to be treated in law as though they are the same. *Norvell* v. *State of Illinois*, 373 US. 420, 10 L. Ed. 2d 456, 459 (1963). The equal protection clause does not prohibit legislative classification or the imposition of statutory restraints on one class which are not imposed on another. *Metropolitan Cas. Ins. Co. of New York* v. *Brownell*, 294 U.S. 580, 79 L. Ed. 1070, 1072 (1935). In exercising its power of regulation, the state has broad discretion in the matter of classification, subject only to the requirement that the classification is reasonable, not arbitrary, and that it rests "upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Johnson* v. *Robison*, 415 U.S. 361, 39 L. Ed. 2d 389 (1974). Legislation will be set aside as violative of the equal protection clause only if it is based on reasons totally unrelated to the pursuit of a legitimate state end. *McDonald* v. *Bd. of Election Com. of Chicago*, 394 U.S. 802, 22 L. Ed. 2d 739, 745 (1969).

The Illinois Funeral or Burial Funds Act is related to the legitimate state end of protecting the public from fraud. In view of the long interval between full receipt of the purchase price and contract performance in pre-need sales,

the Act validly distinguishes between these sales and sales of funeral merchandise made at the time of need. The Act uniformly applies to all individuals or corporations that contract for the sale of burial merchandise or services on a pre-need basis and collect payments in advance. This includes funeral directors, undertakers, embalmers or any other persons who elect to collect for such commodities in advance of actual need. Consequently, the Act does not deny appellant equal protection of the law.

Appellant essentially contends that equal protection is denied because burial societies are required by statute to deposit in trust only 35% of the funds collected from its members. It must be noted that the Illinois legislature has altogether prohibited the formation of burial societies by providing that "no person, firm, corporation, society or association shall enter business as a burial society after the effective dates of this amendatory Act of 1959." Ill. Rev. Stat., 1977, Ch. 73, § 951. Only those societies which were organized prior to the amended Act may continue to transact business. Unlike burial societies, appellant's business is not prohibited, but simply regulated.

The distinction between those burial societies allowed to operate and pre-need burial businesses readily justifies a difference in statutory treatment. Such societies are a form of mutual benefit association established to assure that each member will, upon death, receive a specified sum. The society is subject to stringent state regulation under the Illinois Insurance Code regarding its Articles of Incorporation, the management of its affairs, certain deposits to be maintained with the Director of Insurance, and the bonding of its officers. (§§ 952-53) The directors may not retain office for more than three years. (§ 952) The society must agree, in issuing certificates of membership, to pay a specified sum of money not to exceed $1,000, "which spe-

cified amount shall not be diminished during the existence of the contract." (§ 955) The certificates must be approved by the Director of Insurance, and the society must pay the burial benefit in "lawful money." (§ 956) The society may not require a member to purchase funeral supplies or services from any specific individual or corporation, nor agree to offer funeral supplies in lieu of the cash payment. (§ 957) The members pay a premium or assessment, 35% of which must be retained in cash or invested only in accordance with the Illinois Insurance Code. (§ 958) No investments or loans may be secured by real estate in which an officer or director has any financial interest. (§ 958.2) All claims must be approved or disapproved by the society within sixty days after receipt of proof of death. (§ 959) The society will be liquidated by the Director of Insurance if it substitutes funeral services or supplies for cash payments, fails to maintain the cash deposit, conducts its business fraudently, does not carry out its contracts in good faith, or is more than thirty days in arrears in payment of death claims after approval. (§ 959) Likewise, the individual members may by injunction prevent the doing of unlawful acts contrary to the Articles of Incorporation of the society. *Dale* v. *Hancock County Mutual Life Ass'n.*, 363 Ill. 222, 2 N.E. 2d 96, 98 (1936).

The fidiciary duties of the directors, officers and agents of a burial society to its members are readily apparent. All of the activities of the society are subject to direct scrutiny by its members, including their control over the election of the Board of Directors. Whereas the society exists for the benefit of its members, appellant's business is operated exclusively to provide the owners with a profit. Purchasers have no influence over the activities of the business and no way of assuring delivery of burial merchandise in the future. The Illinois legislature therefore properly

distinguished between such entities and treated pre-need burial businesses under a separate statutory scheme entitled "Public Health and Safety." In view of the nature of appellant's business, the 95% trust requirements bears a substantial relation to the public welfare.

Likewise the funds accepted by cemetery associations under the Cemetery Care Act, Ill. Rev. Stat., 1977, Ch. 21, § 64.1 *et seq.*, are entirely different from the funds collected by appellant. Such funds are collected in connection with the sale of a specific cemetery lot, grave, crypt and the like, and are paid for the maintenance of,

> . . . a cemetery and of the lots, graves, crypts, niches, family mausoleums, memorials, and markers therein; including cutting and trimming of lawn, shrubs and trees at reasonable intervals; keeping in repair the drains, water lines, roads, buildings, fences and other structures, in keeping with a well maintained cemetery; also overhead expense necessary for such purposes, including maintenance of machinery, tools and equipment for such care; compensation of employees, payment of insurance premiums, reasonable payments for employees pensions and other benefit plans, and maintaining necessary records of lot ownership, transfers and burials. Ill. Rev. Stat., 1977, Ch. 21, § 64.2.

The Act clearly envisions immediate performance under the contract with respect to the cemetery and the specific site purchased. Substantial sums may be employed by the cemetery association at the outset to care for the site. To insure continued care, the statute requires that a minimum of 15 percent of the sales price for a grave and 10% of the sales price for a crypt be set aside in trust, the net income of which is to be used for such future care. The statute requires that purchasers be informed that care will be furnished only in so far as the net income derived from the amount deposited in trust will permit. Where a contract pro-

vides for "special care" of any lot, grave, crypt, niche, or mausoleum, the full amount received must be deposited in trust. Ill. Rev. Stat., 1977, Ch. 21, § 64.4. Contracts made under the Cemetery Care Act are not *in futuro* contracts but are entered into to assure performance immediately and in perpetuity.

As stated, the merchandise sold by appellant is not even in existence at the time of sale and there is no immediate performance anticipated under the contract. While all the above statutes generally relate to funeral services and merchandise, the legislature need not regulate in the same manner all businesses and associations that deal with such commodities. The legislature may weigh relative needs and restrict the application of a legislative policy to less than the entire field. *Mabee* v. *White Plains Publishing Co., Inc.*, 327 U.S. 178, 184, 90 L. Ed. 607 (1945). Appellant is not denied equal protection of the law because a lesser amount of the funds collected by burial societies and cemetery associations must be deposited in trust.

CONCLUSION

For all these reasons appellee respectfully submits that the present appeal does not present a substantial federal question and that the decision below is so plainly correct as to warrant no further review. Appellee therefore respectfully moves this Honorable Court to dismiss this appeal.

Respectfully submitted,

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*Ms. Sally Adams, a graduate of The John Marshall Law School, Chicago, Illinois, assisted in the preparation of this motion.

APPENDIX

Ill. Rev. Stat., 1969, Ch. 111½, § 73.105:

> **73.105 Expenses in custody and administration of funds.]** § 5. This Act shall not be construed to prohibit the trustee and trustee's depositary from being reimbursed and receiving from such funds their reasonable expenses in the custody and administration of such funds and the usual and reasonable compensation for their services as such trustee and trustee's depositary, provided that the combined expenses and compensation shall not exceed the total of 5% of the principal fund and 5% of the earnings of the fund so deposited under each of the agreements or series of agreements.

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Ill. Rev. Stat., 1977, Ch. 21, § 64.2 provides in pertinent part:

> **64.2** § 2. **Definitions.]** The following words, terms and phrases used in this Act, for the purpose of this Act, have the following meanings:
>
> "Comptroller" means the Comptroller of the State of Illinois.
>
> "Care" means the maintenance of a cemetery and of the lots, graves, crypts, niches, family mausoleums, memorials, and markers therein; includng cutting and trimming of lawn, shrubs and trees at reasonable intervals; keeping in repair the drains, water lines, roads, buildings, fences and other structures, in keeping with a well maintained cemetery; also overhead expense necessary for such purposes, including maintenance of machinery, tools and equipment for such care; compensation of employees, payment of insurance premiums, reasonable payments for employees pension and other benefit plans, and maintaining necessary records of lot ownership, transfers and burials.

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Ill. Rev. Stat., 1977, Ch. 21, § 64.4:

64.4 Care funds—Instrument regarding care to be furnished by cemetery authority.] § 4. Whenever a cemetery authority owning, operating, controlling or managing a privately operated cemetery accepts care funds, either in connection with the sale of a lot, grave, crypt or niche, or in pursuance of a contract, or whenever, as a condition precedent to the purchase of a lot, grave, crypt or niche such cemetery authority requires the establishment of a care fund or a deposit in an already existing care fund, then such cemetery authority shall execute and deliver to the person from whom received an instrument in writing which shall specifically state: (a) the nature and extent of the care to be furnished and (b) that such care shall be furnished only in so far as the net income derived from the amount deposited in trust will permit (the income from the amount so deposited less necessary expenditures of administering the trust shall be deemed the net income), and (c) that not less than the following amounts will be set aside and deposited in trust:

1.) For graves, 20¢ per square foot of the space sold or 15% of the sales price, whichever is the greater, with a minimum of $7.50 for each sale of a single adult grave.

2.) For a crypt, not less than 10% of the sales price with a minimum of $15.00 for each crypt sold.

3.) For a niche, not less than 10% of the sales price with a minimum of $5.00 for each niche sold.

4.) For the special care of any lot, grave, crypt, or niche or of a family mausoleum, memorial, marker, or monument, the full amount received.

Such setting aside and deposit shall be made by such cemetery authority not later than thirty (30) days after the close of the month in which was received the final payment on the purchase price of each lot, grave, crypt or niche, or the final payment for the general or special care of a lot, grave, crypt or niche or of a family mausoleum, memorial, marker or monument; and such amounts shall be held by such cemetery authority or by the trustee of the care funds of such cemetery authority in trust in perpetuity for the specific purposes stated in said written instrument.

Ill. Rev. Stat., 1977, Ch. 73, § 951:

951. § 339. Present Authorized Burial Societies May Transact Business.] Every society organized prior to the effective date of this amendatory Act of 1959 and which society on that date was transacting business under a certificate of authority issued by the Director may continue to transact such business subject to the provisions of this article, but except as provided in Section 336a[1] no person, firm, corporation, society or association shall enter business as a burial society after the effective date of this amendatory Act of 1959. As amended by act approved July 15, 1959. L. 1959, p. 1150.

Ill. Rev. Stat., 1977, Ch. 73 § 952:

952. §340. Article of Incorporation.] The articles of incorporation of a burial society shall state:

• • •

(b) The mode and manner in which the corporate powers of the society shall be exercised; the manner of electing directors; the number of directors which shall not be less than 3 nor more than 7; terms of office of directors which shall be not more than 3 years; the manner of electing officers and filling vacancies and such other particulars as may be necessary to explain and manifest the object and purpose of the society and the manner in which it is to be conducted.

• • •

Ill. Rev. Stat., 1977, Ch. 73, § 953:

953. § 341. Deposit Required.] (1) Every burial society shall maintain with the Director a deposit of

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1. Section 948a of this chapter.

cash or securities in an amount of at least one thousand dollars. Any society having a membership of more than twenty-five hundred members and less than five thousand members shall maintain a deposit with the director of five thousand dollars. Any society having a membership of more than five thousand members and less than ten thousand members shall maintain a deposit with the Director of ten thousand dollars. Any society having more than ten thousand members shall maintain a deposit with the Director of ten thousand dollars and an additional one thousand dollars for each one thousand members in excess of ten thousand.

(2) All deposits as required herein shall be in cash or in securities permitted by section 346.[1]

Ill Rev. Stat., 1977, Ch. 73, § 954:

954. § 342. Officers Bond.] The officer or officers of the society entrusted with the custody of its funds shall give bond to the association in double the amount of the minimum deposit required by this article, but in no event less than Two Thousand ($2,000) Dollars or more than Five Thousand ($5,000) Dollars, conditioned upon the faithful performance of his or their duties and accounting for the funds entrusted to his or their custody.

Ill. Rev. Stat., 1977, Ch. 73, § 955:

955. § 343. Certificate form.] (1) Every burial society shall issue a certificate of membership to each member, agreeing to pay upon death a specified sum of money not to exceed $1,000, which specified amount shall not be diminished during the existence of the contract. The form of certificate shall be submitted to the Director for his approval before the same shall be issued. Each certificate issued after the effective date of this Code, shall contain the following provisions, and

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1. Section 958 of this chapter.

shall be printed in clear readable type or uniform size except that the words in capital letters in the following form may be in larger type:

* * *

956. § 344. Burial Benefit Payable in Lawful Money.] No society operating under or by virtue of this article shall pay a burial benefit or award other than in lawful money of the United States and any provision in any contract to the contrary shall be of no effect, nor shall any member of any society or representative or beneficiary of such member be required as a condition of his becoming a member, or otherwise, to purchase funeral supplies or burial services from any specified or designated person, firm or corporation so as to deprive the representative, beneficiary or family of any such member from procuring or purchasing said supplies and services in the open market.

Ill. Rev. Stat., 1977, Ch. 73, § 957:

957. § 345. Society and Directors or Officers May Not Advertise Funeral Supplies. No burial society nor any officer, director or agent of any burial society shall offer or make any oral or written agreement to furnish, or shall distribute or cause to be distributed any literature or advertising of any kind whatsoever which offers or purports to offer, funeral supplies of any kind in lieu of the cash payment upon the death of a member. Upon any violation of this section by any society, or officer, director or agent thereof, the Director shall proceed to liquidate such society in accordance with the provisions of Article XIII[1] [As amended by act approved July 6. 1937, L. 1937, p. 689.]

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1. Sections 799-833 of this chapter.

Ill. Rev. Stat., 1977, Ch. 73, § 958:

958. § 346. Benefit Account and Expense Account.] (1) All burial societies shall charge a premium or levy an assessment to be paid by the members. The society shall not use more than sixty-five per centum of such premium or assessment for the purpose of paying commissions, salaries and other expenses of operation, and the surplus and legal reserves shall constitute the benefit account of the society and shall be retained in cash or be invested in accordance with Article VIII.[1]

(2) No society shall invest in or loan upon any bond or note secured by mortgage or trust deed on real estate if an officer or director of such society has any financial interest in the real estate upon which the loan is made.

Amended by P.A. 80-624, § 1, eff. Oct. 1, 1977.

Ill. Rev. Stat., 1977, Ch. 73, § 959:

959. § 347. Failure to Maintain Deposit—Payment of Claims.] All claims filed with a society shall be approved or disapproved within sixty days after receipt of due proof of death and, if approved, shall be paid within thirty days after such approval. The Director shall proceed under Article XIII[1] to liquidate any society which shall fail to maintain the deposit required by this article, or shall conduct its business fradulently, or is not carrying out its contracts in good faith, or shall be thirty days or more in arrears in payment of death claims after the same have been allowed by the board of directors, or has violated any of the provisions of this article.

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1. Chapter 73, §§ 736 to 743.
1. Sections 799-833 of this chapter.

Supreme Court, U. S.
FILED
MAY 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1185

MEMORIAL CONSULTANTS, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. GEORGE W. LINDBERG, COMPTROLLER OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

REPLY TO MOTION TO DISMISS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1185

MEMORIAL CONSULTANTS, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS EX REL. GEORGE W. LINDBERG, COMPTROLLER OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

REPLY TO MOTION TO DISMISS.

There are several parts of the Motion to Dismiss that need correction and/or clarification. At footnote 1 page 5 of the MOTION it is suggested that our statement of fact is erroneous and at page 15 of the MOTION it is urged that "the Act does not deny Appellant equal protection of the law" because it applies to traditional, at need, funeral industry members "who elect to collect for such commodities in advance of actual need."

ARGUMENT.

1.

THE FACTS STATED ON PAGE 4 OF THE JURISDICTIONAL STATEMENT ARE COVERED BY STIPULATION AND STAND ADMITTED.

In fairness to the Assistant Attorneys General appearing on the Motion to Dismiss it should be pointed out that neither of them participated in any aspect of the trial level proceedings including the preparation of the stipulation. [R. C-207 thru C-210]. Thus, they could not have known that in order to shorten the stipulation paragraph 25 thereof explicitly "incorporated into this stipulation" the allegations of Appelant's verified counterclaim.[1]

By footnote 1 at page 5 of the MOTION, appellee is apparently trying to remove from this Court's consideration enumerated facts 1 and 5 as stated at page 4 of the Jurisdictional Statement, viz:

> "1. That appellant's cost of vaults sold is less than 35% of gross vault receipts and together with other operating expenses produces an average net profit margin of 5%. [R. C-164]."
>
> "5. That appellant, and those similarly situated, provide the only horizontal competition to funeral directors whose sales are principally made to decedent's next of kin between the time of death and the time of burial . . . [R. C-162 & C-199]."

In any event, appellee does not take exception to the findings contained in "Report by the Presiding Officer on Proposed Trade Regulation Rule Concerning Funeral Industry Practice [16 C. F. R. Part 453, Public Record 215-46 (July 1977)]" [Jurisdictional Statement, App. D, pp. A-14 thru A-22] including the following:

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1. As originally filed the counterclaim was not verified but thereafter, in response to Appellee's motion the trial court ordered verification. [R. C-193 & C-199 & C-200].

> "Among devices used by the funeral industry to restrict pre-need sales are state laws and regulations that require a 100% burial trust fund deposit of pre-need funds * * * Without funds to pay overhead, prospective sellers of pre-need funerals will not enter this market. * * * As a consequence, if a seller will not sell, the consumer is deprived of the opportunity to choose freely among alternatives which should be available to him." [Jurisdictional Statement, App. D, A-20].

> "An official of the Comptroller of the State of Illinois made a study of the burial trust law of Illinois. * * * The study indicates that the deposit of the current cost (not the sales price) of merchandise or services * * * would provide adequate funds to deliver such goods and services at any given time in the future. * * * The study * * * substantiates the position that a 100% deposit is not necessary as a requirement to guarantee delivery of promised funeral goods and services at a later date." [*Ibid,* A-21].
>
> "The funeral consumer can avoid problems associated with at need sales by making funeral arrangements in advance of need. His opportunity to do so is presently restricted by the 100% trust fund laws * * *. These restrictive laws have been sponsored by traditional (at need) funeral industry members." [*Ibid,* A-22].

2.

THE CLAIM THAT THE ACT IS CONSTITUTIONAL BECAUSE IT CAN APPLY TO TRADITIONAL, AT-NEED FUNERAL INDUSTRY MEMBERS IGNORES REALITY AND THE ANTAGONISM OF THE INDUSTRY TO PRE-NEED ARRANGEMENTS BY ANYONE INCLUDING ITS OWN MEMBERS.

The fact that the Illinois Funeral or Burial Trust Fund Act facially applies to "funeral directors, undertakers, embalmers or any other persons who elect to collect for such commodities in advance of actual need" [Motion to Dismiss, p. 15] does not mean that in practice funeral industry members engage in pre-

need arrangements. Indeed, the record is replete with examples to the contrary, e.g.:

> 1. In this case, the Illinois State Funeral Directors intervened as a party plaintiff and only withdrew when appellant counterclaimed "that the association members have combined to eliminate competition and to restrain retail trade of burial vaults in violation of the Illinois Antitrust Act." [Motion to Dismiss, p. 5].
>
> 2. The Federal Trade Commission has "stated that it has reason to believe that 'Actions by funeral industry members to inhibit economical funeral offerings, pre-need arrangements, immediate disposition services, or memorial societies disadvantage consumers by restricting their choice of funeral arrangements and may suppress competition in that industry'." [Jurisdictional Statement, App. D, A-17].
>
> 3. "[T]he at-need funeral industry has sponsored and supported state laws which prevent the solicitation of consumers for the purchase of funeral service merchandise before death" [*Ibid*, A-19] which obviously apply with special force to industry members themselves.

Appellee's claim that "that Act does not deny Appellant equal protection of the law" because it can apply to funeral directors is not only a sham argument but points up the sham nature of the statute itself in light of the facts as they really are.

CONCLUSION.

Appellee concedes this Court's jurisdiction under 28 USC §§ 1257(2) and 2101(c) [Motion to Dismiss, pp. 2-3] and when tested by the critical and undeniable facts which he seeks to overlook and obscure the Act in controversy clearly offends the Equal Protection and Due Process Clauses of the Fourteenth Amendment. It prohibits Appellant's otherwise lawful business, it has no rational connection between legislative means and purpose, alternative means to achieve the legislative objective are readily available and in light of the emerging concerns of the Federal Trade Commission with regard to the anticompetitive effects of the so-called burial trust fund laws it cannot be fairly said that the statute reflects legislative concern for a purpose legitimately supporting its 100% trusting requirements.

For the foregoing reasons and for the reasons stated in the Jurisdictional Statement, it is clear that the Court has jurisdiction and that the question presented is substantial and involves matters of public importance.

Respectfully submitted,

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